

RECEIVED

DOCKET FILE COPY ORIGINAL NOV 11 2 1993

LAW OFFICES  
VERNER, LIIPFERT, BERNHARD, McPHERSON AND HANSEN  
CHARTERED  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

JAMES M. VERNER\*  
EUGENE T. LIIPFERT  
EMERITUS

BERL BERNHARD  
HARRY McPHERSON  
LLOYD N. HAND\*  
RONALD B. NATALIE  
WILLIAM C. EVANS  
MICHAEL J. ROBERTS  
FRITZ R. KAHN  
BERNHARDT K. WRUBLE  
THOMAS J. KELLER  
JOHN A. MERRIGAN  
JOSEPH L. MANSON, III  
WILLIAM H. CRISPIN\*  
CLINTON A. VINCE  
GLENN L. ORTHMAN  
ERWIN G. KRASNOW  
JAMES F. HIBEY  
RUSSELL E. POMMER  
GEORGE M. FOOTE, JR.\*  
BUEL WHITE\*  
WILLIAM F. ROEDER, JR.\*  
ROY G. BOWMAN  
AMY L. BONDURANT  
HOPEWELL H. DARNEILLE, III  
DOUGLAS OCHS ADLER

RILEY K. TEMPLE\*  
JOHN P. CAMPBELL\*  
MICHAEL J. BARTLETT\*  
DOUGLAS J. COLTON  
JOHN H. ZENTAY  
FRED W. DROGULA  
ANDREA JILL GRANT  
GARY J. KLEIN  
J. CATHY FOGEL  
JOHN B. CONNOR\*\*  
LAWRENCE R. SIDMAN  
WILLIAM E. KENNARD  
BENJAMIN H. FLOWE, JR.  
FREDERICK J. TANSILL\*  
PAUL E. NORDSTROM  
SHERRY A. QUIRK  
J. RICHARD HAMMETT\*  
MICHAEL D. GOLDEN  
SUSAN O. TEMKIN  
JAMES J. BLANCHARD\*  
WILLIAM A. ZEITLER\*  
NEIL T. PROTO  
LESLIE M. ALDEN\*  
LAWRENCE Z. LORBER  
R. STUART BROOK  
ROBERT G. VARNER, JR.  
KENNETH S. BARR

SUITE 700  
901-15TH STREET, N.W.  
WASHINGTON, D.C. 20005-2301  
(202) 371-6000  
TELEX: 1561792 VERLIP UT  
TELECOPIER: (202) 371-6279

HOUSTON OFFICE  
6901 TEXAS COMMERCE TOWER  
600 TRAVIS  
HOUSTON, TEXAS 77002  
(713) 237-9034  
TELECOPIER: (713) 237-1216

VIRGINIA OFFICES  
8280 GREENSBORO DRIVE  
MCLEAN, VIRGINIA 22102  
(703) 749-6000  
TELECOPIER: (703) 749-6027  
10484-A ARMSTRONG STREET  
FAIRFAX, VIRGINIA 22030  
(703) 591-2883  
TELECOPIER: (703) 385-7998

TERRENCE J. MCCARTIN  
DEAN R. BRENNER  
FRANCES C. DELAURENTIS  
LAWRENCE N. COOPER\*  
DON C. LEWIS  
LINDA E. COLLIER\*  
REBECCA M.J. GOULD\*  
JOHN S. MOOT  
MARK R. LEWIS  
SCOTT K. DAINES\*  
LESLIE B. KRAMERICH\*  
E. JOHN KRUMHOLTZ  
MICHAEL E. BELLER  
LISA J. GEFEN  
MICHAEL H. TECKLENBURG\*  
RICHARD J. BIFFL\*  
SHARI B. GERSTEN\*  
PETER A. GOULD  
WILLIAM E. VINCENT  
JOHN B. BRITTON  
ANDREW D. ESKIN  
MARIE L. MILLER\*\*  
GUY A. MORLEY\*

BRIAN A. MIZOGUCHI  
JOHN R. MIETUS, JR.  
BONNIE M. DEUTSCH  
JACQUELINE R. KINNEY  
KRISTA L. POOL\*  
JEANETTE M. PABLO\*  
KATHERINE A. ELLIS\*  
SUSAN G. BLUMENTHAL\*  
HEDY L. NELSON  
GLENN R. MOORE\*  
BARBARA L. BURTON  
DAVID TONG ZHANG\*  
THOMAS K. JONES\*\*  
STUART J. RABIN\*  
ERIC T. WERNER\*  
DIANE ULLA MAGE  
CHRIS B. WETHERINGTON\*  
JOHN A. ORDWAY, JR.  
BETH WOLFE  
DOUGLAS W. HALL  
LISA HARRIS DEAN  
J. GREGORY BISHOP

OF COUNSEL

PAUL C. SHEELINE  
RICHARD H. SALTSMAN  
CHARLENE A. STURBITTS  
HOWELL E. BEGLE, JR.  
BRUCE A. KIMBLE\*  
ROBERT W. BLANCHETTE  
DOROTHEA SUMMERELL

MARY K. WILLIAMS\*  
JOSEPH E. BRENNAN\*  
STEPHEN W. VAN HOOSER\*  
GENE R. SCHLEPPENBACH\*  
J. ROBERT KIRK  
JAMES K. JACKSON

LOUIS F. BESIO  
VICE PRESIDENT FOR  
FINANCE AND ADMINISTRATION  
WRITER'S DIRECT DIAL NUMBER

November 11, 1993

(202)

371-6060

Mr. William Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W. - Room 222  
Washington, D.C. 20554

Re: GN Docket No. 93-252

Dear Mr. Caton:

On November 8, 1993, the Association of American Railroads filed comments in the above-referenced docket. It has come to our attention that page 2 was inadvertently omitted and that two copies of page 3 were included. Enclosed is a substitute copy of AAR's comments.

Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,

*Thomas J. Keller*  
Thomas J. Keller

Enclosure

No. of Copies rec'd  
List ABCDE

044

RECEIVED

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

NOV 12 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of Sections 3(n) and 332 )  
of the Communications Act ) GN Docket No. 93-252  
 )  
Regulatory Treatment of Mobile Services )

To: The Commission

**COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS**

The Association of American Railroads ("AAR"), by its undersigned counsel, hereby responds to the invitation for comments issued by the Commission in the Notice of Proposed Rule Making in the above-captioned proceeding, released October 8, 1993 (hereinafter "Notice").

**I. BACKGROUND AND PRELIMINARY STATEMENT**

The Commission is required by the Omnibus Budget Reconciliation Act of 1993<sup>1/</sup> (the "Budget Act") to create a comprehensive framework for the regulation of existing and future mobile radio services. Specifically, in enacting the Budget Act, Congress amended Sections 3(n) and 332 of the Communications Act which previously governed private land mobile radio service.<sup>2/</sup> Under new Section 332 of the Communications Act, mobile services are now classified as either "commercial mobile services" or "private mobile services." Commercial mobile service providers are treated as common carriers under the revised Section 332,

---

<sup>1/</sup> Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

<sup>2/</sup> 47 U.S.C. §§ 153(n), 332.

while private mobile service providers are not subject to any common carrier regulation.

The railroads are extensive users of private land mobile radio services regulated under Part 90 of the Commission's Rules. The railroads utilize over 100 private land mobile radio frequencies in the VHF and UHF bands to safeguard life and property and to support efficient and reliable railroad operations. Accordingly, the railroad industry has a vital interest in this proceeding.

## **II. THE RAILROADS SUPPORT THE COMMISSION'S PROPOSED DEFINITIONS OF MOBILE SERVICES**

The Budget Act amended the definition of "mobile service" under Section 3(n) of the Communications Act to specify that private land mobile services and personal communications services are to be included in the definition of "mobile service" that are regulated under revised Section 332. As a result, the Commission has proposed to include private land mobile services regulated under Part 90 within this definition. Notice at ¶ 9. The railroads support the Commission's approach of including all existing mobile services, including private land mobile services, within the ambit of Section 332.

### **A. Commercial Mobile Service**

Revised Section 332 of the Communications Act provides that a mobile service will be defined as commercial if the service (1) is "provided for profit" and (2) makes "interconnection service" available "to the public" or "to such classes of eligible users

as to be effectively available to a substantial portion of the public."

**1. Service Provided For-Profit**

The first element of the definition of "commercial mobile service" is that the mobile service must be offered "for-profit." The Commission has proposed that mobile radio systems that are operated by governments, non-profit public safety entities and businesses such as the railroads which use the systems solely for their own private operational communications would not be considered to be providing mobile radio services to customers "for-profit." Id. at ¶ 11.

The railroads support the Commission's proposed approach that if a business operates a mobile radio service solely for its own private use in support of its business operations, such use will not be classified as "for-profit."

**2. Interconnected Service Available to the Public**

The second element of the statutory definition of "commercial mobile service" requires that "interconnected service," (i.e., service that is "interconnected with the public switched network") be available to the public or a substantial portion of the public. Id. at ¶ 14, 23. Although some railroad mobile radio systems do permit interconnection with the public switched network, this fact alone should not render them "commercial" for purposes of the statute. Instead, the Commission should interpret the interconnection criterion as requiring not only that the mobile radio system be capable of interconnection, but also that the system operator provide interconnection service to paying subscribers.

A component of the definition of commercial mobile services requires that interconnected service be made available "to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public." Id. at ¶ 23. Railroad mobile communication systems do not provide "public interconnection" with the switched network, and thus do not meet the second element of the statutory definition of "commercial mobile systems." The AAR agrees with the Commission's approach that private land mobile radio services that are used by specific industries, businesses, or other user groups such as the railroads (pursuant to Part 90 of the Commission's rules), are not intended for use by the public or even a "substantial portion" of the public." Id. at ¶ 25. As a result, the railroads support the Commission's proposal to exclude such private land mobile radio systems from the definition of commercial mobile services.

### **III. Commission's Classification of Existing Services is Correct**

The railroads support the Commission's tentative conclusion that all existing private non-commercial mobile radio services be classified as private mobile services under Section 332(d)(3) of the Communications Act. Id. at ¶ 35. As indicated previously, the railroads operate private land mobile radio facilities on over 100 channels that are used to ensure safe, reliable and efficient railroad operations. Because these uses of mobile radio fall outside the definitional parameters of "commercial mobile service," they should not be regulated as common carrier

services but should continue to be regulated as private mobile services as the Commission has proposed.

**IV. CONCLUSION**

The railroads believe that their licensed mobile radio services under Part 90 of the Commission's rules should continue to be regulated as private radio services because they function primarily for safety purposes and for the internal support of railroad operations, they are not operated on a for-profit basis, and they do not provide public interconnection to the switched telephone network.

Respectfully submitted,

THE ASSOCIATION OF AMERICAN RAILROADS

By 

Thomas J. Keller  
Michael S. Wroblewski

Verner, Liipfert, Bernhard,  
McPherson and Hand, Chartered  
901 15th Street, N.W., Suite 700  
Washington, DC 20005  
(202) 371-6000

Its Attorneys

November 8, 1993

## CERTIFICATE OF SERVICE

I, Norma E. Rusnak, hereby certify that on this 11th day of November, 1993, a substitute copy of the "Comments of Association of American Railroads" (including page two which was inadvertently omitted from the original comments filed on November 8, 1993) was served by first class United States mail, postage prepaid on the following parties:

Chairman James H. Quello  
Federal Communications Commission  
1919 M Street, NW -- Room 802  
Washington, D.C. 20554

Commissioner Andrew D. Barrett  
Federal Communications Commission  
1919 M Street, NW -- Room 844  
Washington, D.C. 20554

Commissioner Ervin S. Duggan  
Federal Communications Commission  
1919 M Street, NW -- Room 832  
Washington, D.C. 20554

Ralph Haller  
Chief, Private Radio Bureau  
Federal Communications Commission  
2025 M Street, NW -- Room 7002  
Washington, D.C. 20554

Kathleen B. Levitz  
Chief, Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, NW - Room 500  
Washington, D.C. 20554

John Cimko, Jr.  
Chief, Mobile Services Division  
Federal Communications Commission  
1919 M Street, NW -- Room 644  
Washington, D.C. 20554

Richard J. Shiben  
Chief, Land Mobile & Microwave Division  
Federal Communications Commission  
1919 M Street, NW -- Room 5202  
Washington, D.C. 20554

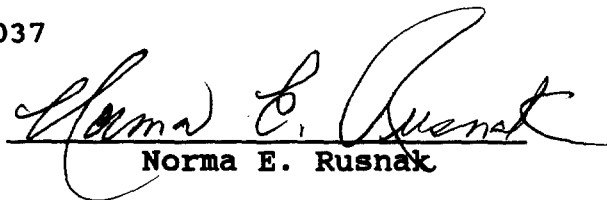
Peter Batacan, Esq.  
Common Carrier Bureau  
Mobile Services Division  
Federal Communications Commission  
1919 M Street, NW -- Room 659  
Washington, D.C. 20554

Nancy Boocker, Esq.  
Common Carrier Bureau  
Mobile Services Division  
Federal Communications Commission  
1919 M Street, NW -- Room 644  
Washington, D.C. 20554

Judith Argentieri, Esq.  
Common Carrier Bureau  
Tariff Division  
Federal Communications Commission  
1919 M Street, NW -- Room 518  
Washington, D.C. 20554

David Furth, Esq.  
Private Radio Bureau  
Land Mobile & Microwave Division  
Federal Communications Commission  
2025 M Street, NW -- Room 5202  
Washington, D.C. 20554

International Transcription Service, Inc.  
2100 M Street, NW  
Suite 150  
Washington, D.C. 20037

  
Norma E. Rusnak